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88-167

Supreme Court, U.S.

FILED

JUL 28 1968

JOSEPH F. SPANIOLO, JR.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN FRANCIS FINNEGAN, III,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED FOR REVIEW

Is a defendant twice placed in jeopardy where, after an acquittal, the State seeks to retry him albeit under a different criminal statute, but where the State must necessarily prove the "same evidence" of time, place, method of occurrence, and the same damage to the same property belonging to the same property owner?

PARTIES

The parties to this action are those
as set forth in the caption.



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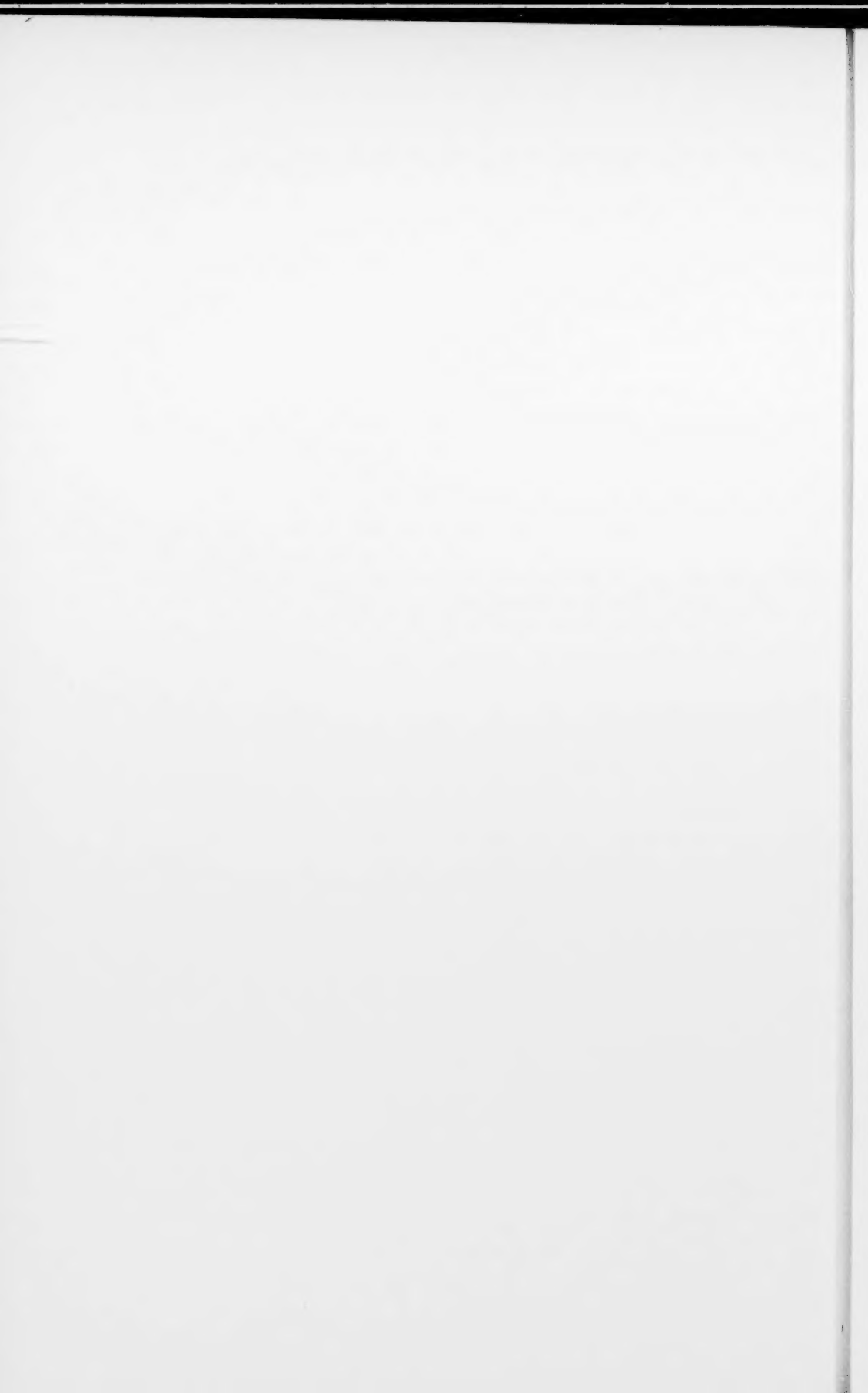
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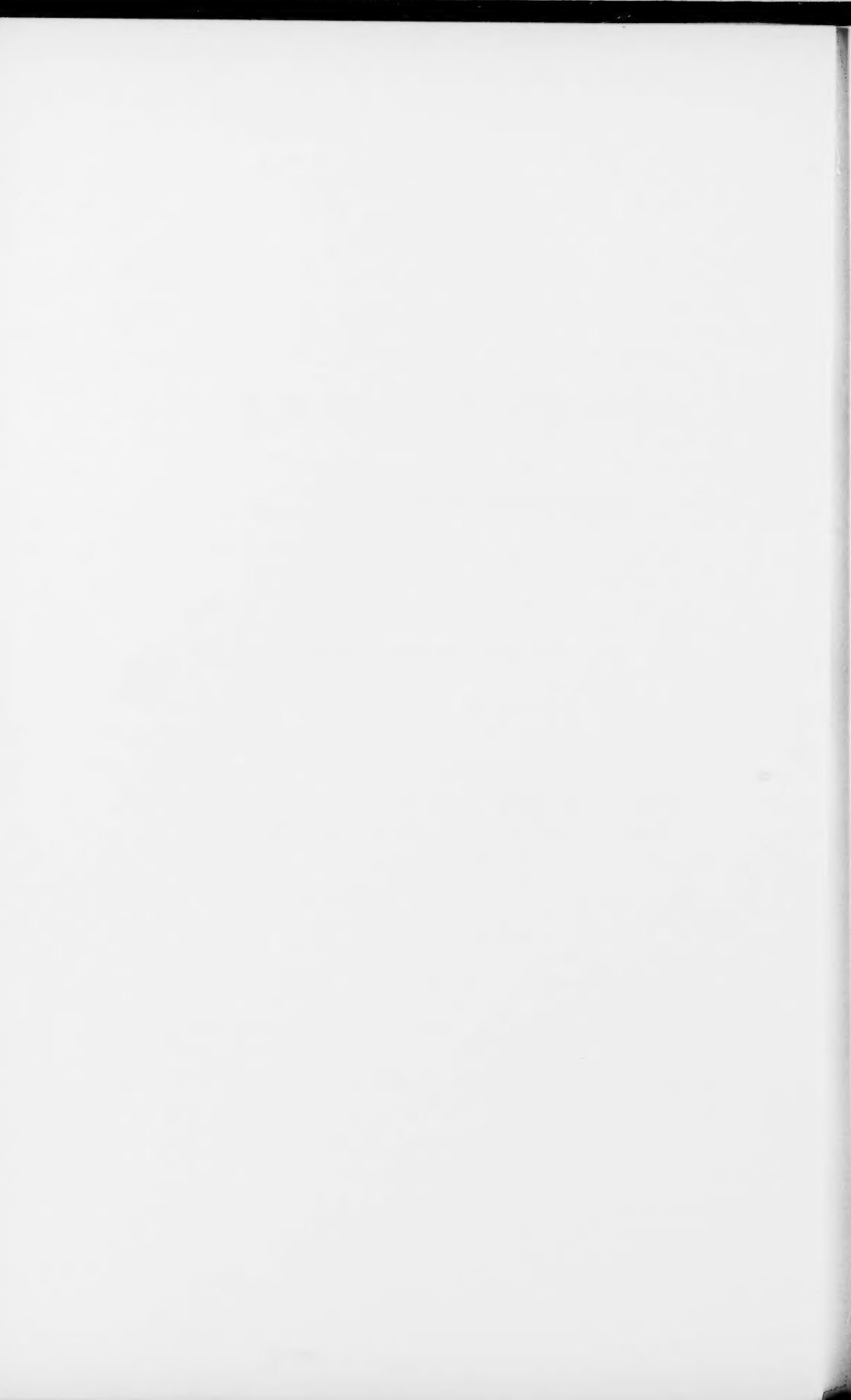
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

OPINIONS BELOW

Petitioner, John F. Finnegan, III,
requests that a Writ of Certiorari be
issued to the Maryland Court of Appeals



to review the denial of a petition for a writ of certiorari to that court (Appendix 5) to review the Memorandum Opinion and Order of the Honorable John J. Mitchell of the Circuit Court of Montgomery County, Maryland (Appendix 4).

JURISDICTION

A petition for a writ of certiorari to the Maryland Court of Appeals was denied by an Order dated 31 May 1988.

This petition for certiorari was filed within sixty (60) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION

The United States Constitution, Amendment V provides:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis supplied).

STATEMENT OF CASE

On the 15th of July 1987 at approximately 5:00 a.m. a swastika was burned into the front lawn of a residence located at 809 Duke Street, Rockville, Maryland.

As a result of newspaper accounts of this incident, a co-defendant surrendered himself to law enforcement officials, admitted his involvement, and



implicated the Petitioner, John Francis Finnegan, III.

After consulting with counsel, Petitioner surrendered himself to law enforcement authorities.

A criminal complaint against the Petitioner was filed in the District Court for Montgomery County, Maryland (Case No. 01783701). The District Court sits without a jury. This is the "first tier" of the Maryland "two tier" trial court system.

The one count Complaint alleged a violation of Article 27 Section 8 of the Annotated Code of Maryland - Burning Personal Property of Another. (Appendix 2)

The co-defendant was not prosecuted but was granted the opportunity to participate in the Alternative



Community Service (ACS) Program. Upon completion of eighty (80) hours of volunteer community service the charge against the co-defendant would be dismissed.

An oral Pre-Trial Motion to Dismiss based upon the disparity of treatment between the Petitioner and the co-defendant was made on behalf of Mr. Finnegan. This Motion was denied.

Trial commenced before the Honorable Stanley Klavan on the 25th of August 1987 in the District Court for Montgomery County, Maryland.

The State proceeded to call four (4) witnesses; all gave sworn testimony relating to the incident.

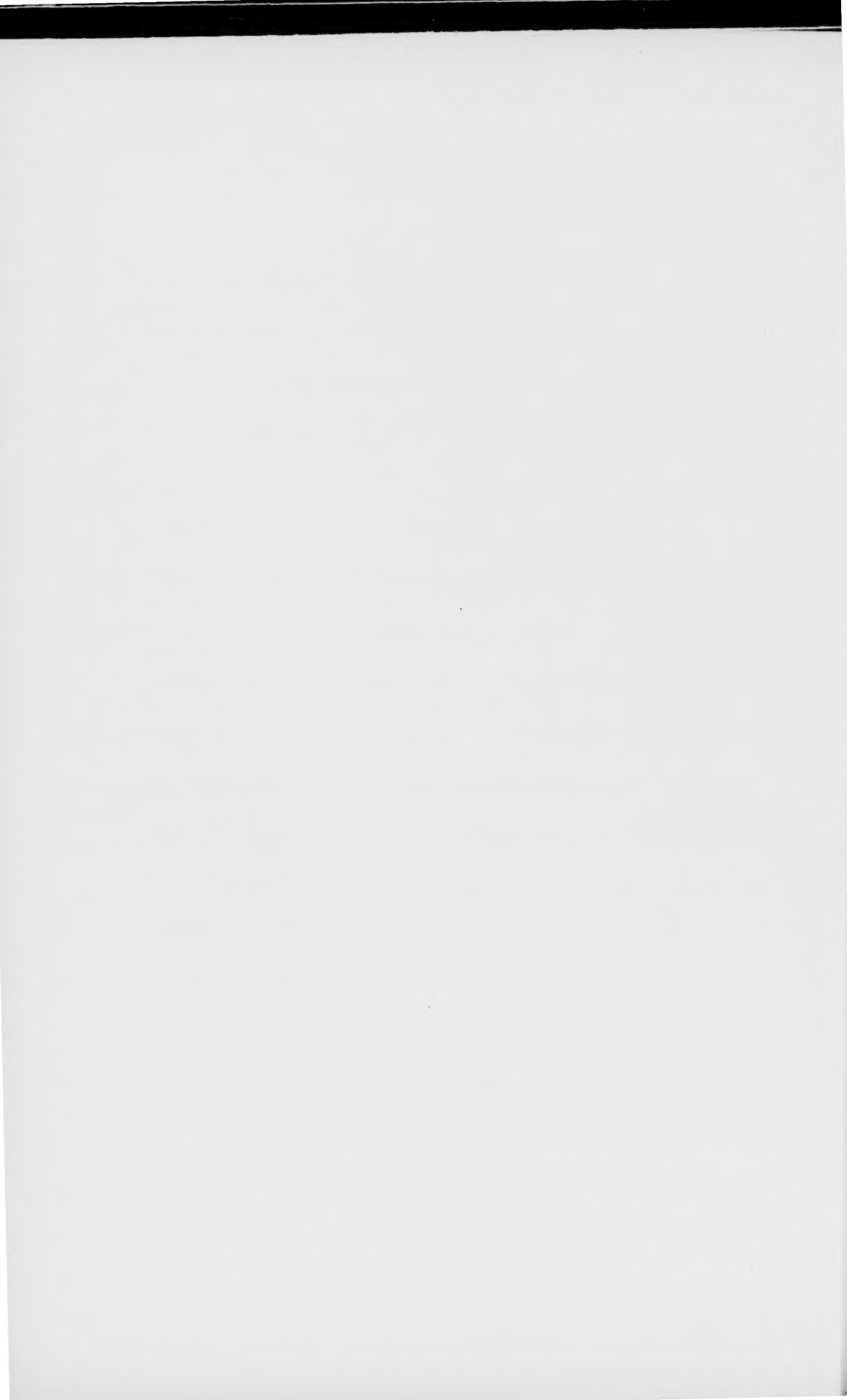
At the conclusion of the State's case, a Motion for Judgment of Acquittal was made on behalf of Mr. Finnegan.



The Motion for Judgment of Acquittal was granted. Judge Stanley Klavan found that the State was unable to establish a prima facie case as to all elements of the offense charged, that being, the burning of any personal property. The trial court stated that what was burned - the lawn - was real property.

On or about the 4th of September 1987 the State's Attorney for Montgomery County, Maryland filed a two (2) count criminal information against the Petitioner in the District Court of Montgomery County, Maryland alleging:

a) Count I - Malicious Destruction of Real Property - contrary to Article 27 §111 of the Annotated Code of Maryland (Appendix 2), and b) Count II - Kindling a Fire Without the Permission of the Owner - contrary to Montgomery County



Code Section 22-88(h). (Appendix 3)

This case has as its Docket Number in the District Court for Montgomery County, Maryland, Number 625514D1.

A Motion to Dismiss this second case based upon the protection of the Double Jeopardy Clause (and prosecutorial vindictiveness) was filed on behalf of the Petitioner.

A hearing on that Motion was held on the 20th of October 1987 before the Honorable Edward Collier of the District Court for Montgomery County, Maryland.

On 16 November 1987 Judge Collier orally rendered his decision denying the defendant's Motion to Dismiss this second case. That opinion was recorded but has not been transcribed.

The defendant timely noted an appeal from the denial of this Motion to

Dismiss to the Circuit Court for Montgomery County, Maryland, in accordance with Courts and Judicial Proceedings Article, Sections 12-403 and 12-401(c).

The Circuit Court in this instance, assumes the role of the defendant's guaranteed first right of an appeal to an appellate court. See, Courts and Judicial Proceedings Article, §12-401(a) and §12-403(a), Annotated Code of Maryland (1984 Repl. Vol.).

The Circuit Court for Montgomery County, Maryland, acting as an appellate court, heard arguments on the Petitioner's Motion to Dismiss on the basis of Double Jeopardy (and prosecutorial vindictiveness) on the 14th of January 1988.

The Circuit Court for Montgomery



County, Maryland (Judge John J. Mitchell) issued a Memorandum Opinion and Order on 9 February 1988 denying the defendant's Motion to Dismiss. A copy of that Opinion is attached as an Appendix 4 to this Petition for Certiorari.

A Petition to the Maryland Court of Appeals was timely filed on the 7th of March 1988.

By way of an Order dated 31 May 1988 Mr. Finnegan's Petition for Certiorari to the Maryland Court of Appeals (the highest Court in the State of Maryland) was denied. (Appendix 5)

This Petition for a Writ of Certiorari follows:

ARGUMENT

This case presents this Court with the opportunity to address this issue:



under what circumstance is the "same evidence test" or the "required evidence test" inadequate to afford an individual the protection embodied in the Double Jeopardy Clause?

The Fifth Amendment of the United States Constitution provides in pertinent part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb ...".

This protects a defendant against a second prosecution for the same offense after an acquittal. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969).

The protection of the Double Jeopardy Clause applies to citizens of Maryland through our common law heritage (Ford v. State, 273 Md. 266, 205 A.2d 809 (1965)) and through the Fourteenth



Amendment of the United States Constitution. Benton v. Maryland, 395 U.S. 793, 89 S.Ct. 2056 (1965).

The lower courts have reasoned that since one element of the offense within the second charging document is different than the first, the second prosecution may go forward without being contrary to the protection afforded by Double Jeopardy Clause.

The petitioner will concede that one element in the two statutes in question is different; one prohibits burning personal property (Article 27 §8) while the other prohibits burning real or personal property (Article 27 §111).

However, "[T]he test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an



additional fact which the other does not. Gavieres v. United States, 220 U.S. 338, 342, 31 S.Ct. 421, 55 L.Ed. 489, and authorities cited." Blockberger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932).

The Petitioner, after an acquittal, is seeking to invoke the protection of the Double Jeopardy Clause since he must now mount a second defense to the State's presentation of the exact same facts.

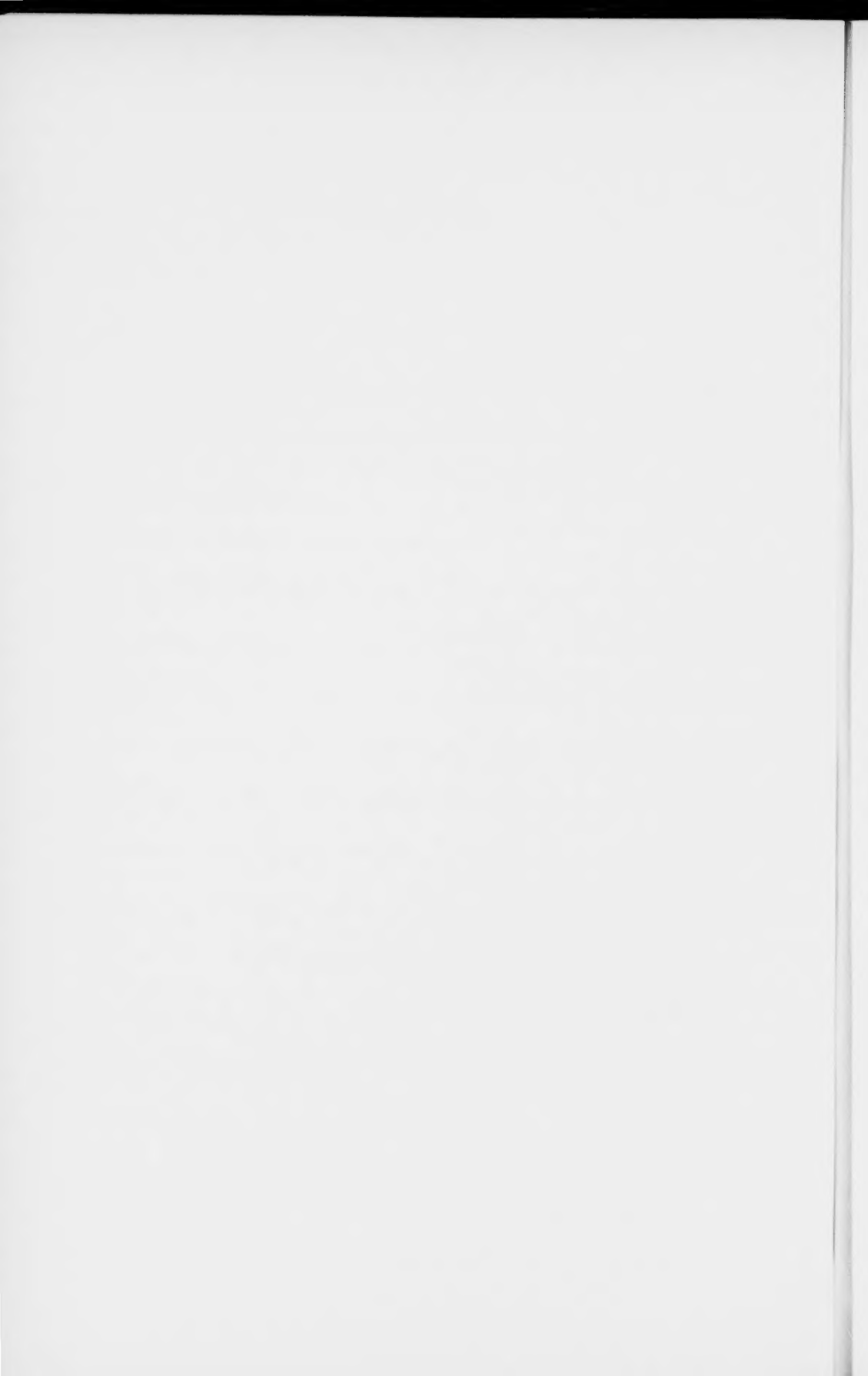
In this case the victim, the testimony, the evidence and all other facts are exactly the same. Only the State's theory of prosecution has been changed.

The protection of the Double Jeopardy Clause is meaningless if the State is given a second opportunity to

force the petitioner to 'run the gauntlet' again against the exact same facts. See Ashe v. Swenson, 397 U.S. 436, 459, 90 S.Ct. 1189, 1202 (1970) (J. Brennan concurring).

The utilization of the "same evidence test" is not dispositive as to whether the protection of the Double Jeopardy Clause is being violated. Inquiry as to whether the protection afforded a defendant by the Double Jeopardy Clause "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings". Sealfon v. United States, 332 U.S. 575, 579, 68 S.Ct. 237, 240 (1948).

"It has long been understood that separate statutory crimes need not be identical - either in constituent



elements or in actual proof - in order to be the same within the meaning of the constitutional prohibition." Brown v. Ohio, 432 U.S. 166, 164, 97 S.Ct. 2221, 2225 (1977). Citations omitted.

The Court of Appeals of Maryland has acknowledged the limitations of using the "same evidence test" exclusively.

We recognize, however, that there may be situations where the required evidence test, coupled with the principle of collateral estoppel, might not be adequate to afford the protection against undue harassment embodied in the purpose of the prohibition against double jeopardy. Cousins v. State, 277 Md. 383, 354, A.2d 825, 833, (1976) cert. den.¹ 492 U.S. 1027, 97 S.Ct. 652 (1976).

¹ See also Brooks v. State, 284 Md. 416, 397 A.2d 596 (1979) which states: "Although the required evidence test is the usual standard to be applied in deciding whether separate offenses should be deemed the same for purposes of double jeopardy and for purposes of merge, it is not the exclusive standard." 397 A.2d at p. 599.



In this instance, the Petitioner is being threatened with a second prosecution. The exact same evidence will be presented to the trier of facts.

It is this pending second prosecution based upon the exact same evidence which violates the protection of the Double Jeopardy Clause.

The State of Maryland seeks a second bite of the prosecution apple. This is impermissible.

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Green v. United States, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223 (1957). See also United States v.



Wilson, 420 U.S. 347, 95 S.Ct. 1013 (1975) and Ohio v. Johnson, 467 U.S. 501, 104 S.Ct. 2536 (1984).

Seeing the error of its first charging document, the State now seeks a second trial. The State will marshal the exact same evidence and presentation so as to meet the elements of a reconsidered charging document. This is a classic illustration of a prosecutor's efforts to prosecute charges seriatim. An evil which is barred by the Fifth Amendment. Ohio v. Johnson, supra.

The State had its one full and fair opportunity to convict. Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824



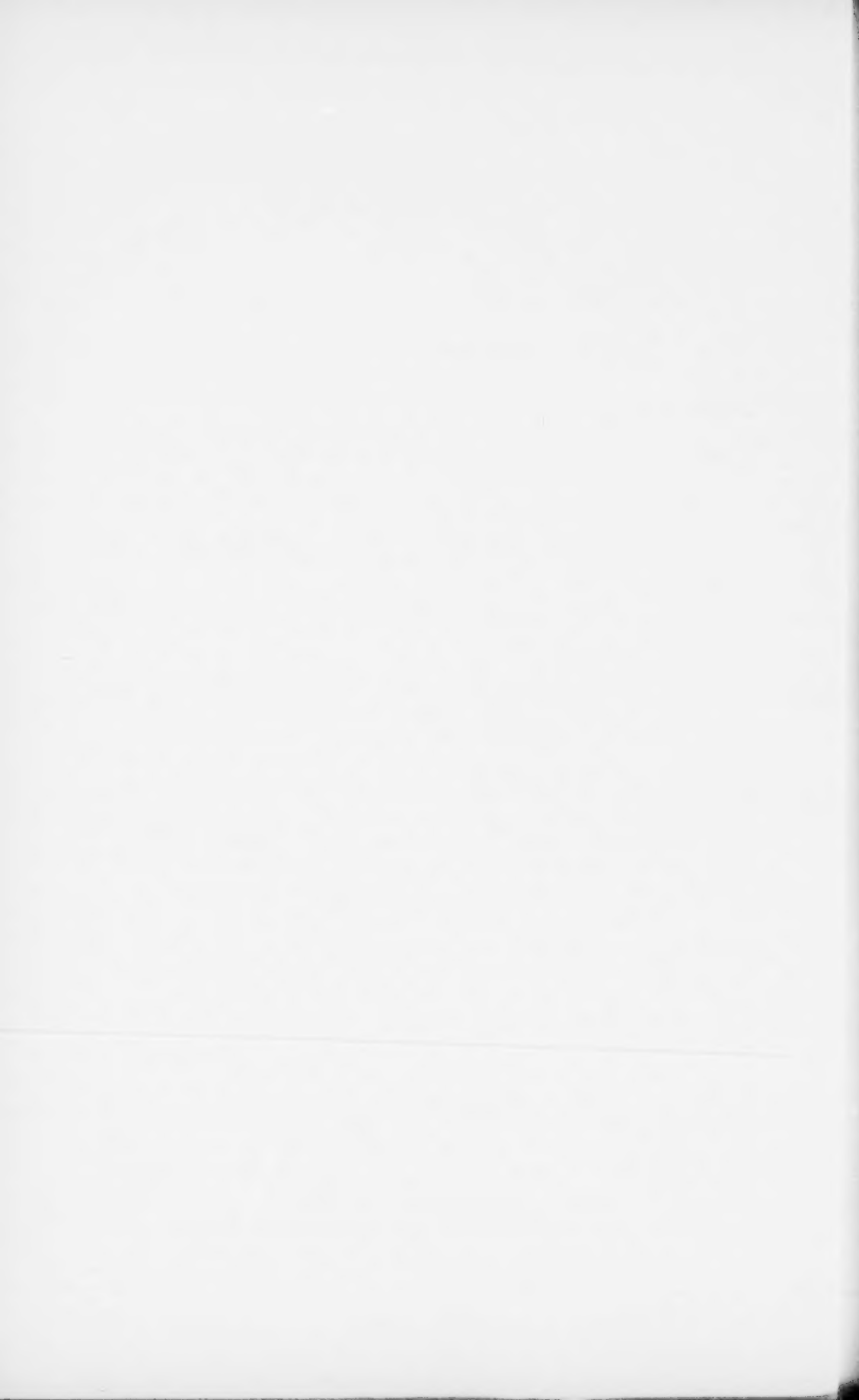
(1978).²

The Petitioner would contend that this case is governed by the decision in Brown v. Ohio, 437 U.S. 161, 97 S.Ct. 2221 (1977).

In Brown the defendant was tried and convicted of joy-riding. Later he was

² "While 'if at first you don't succeed try, try again' may be a lofty and worthy ideal for the general public, it has no place in the area of criminal prosecution where the first attempt at success has fully and completely adjudicated the issues and where the second prosecution merely rehashes old evidence. United States v. Drevetzki, 338 F.Supp. 403 at 409 (N.D. 111. 1972)." Myers v. State, 57 Md. App. 325, 470 A.2d 355, 356 (1984).

In Myers the defendant, after testifying on his own behalf, was found not guilty of theft in the District Court. He was later tried and found guilty of perjury in the Circuit Court based upon his District Court testimony. The Court of Special Appeals found this to be contrary to the protection afforded by the principles of Double Jeopardy.



indicted for theft of the same automobile. The defendant's Motion to Dismiss on the basis of the Double Jeopardy Clause was denied and later affirmed by the Ohio Court of Appeals. The Ohio Supreme Court denied leave to appeal but certiorari was granted by the United States Supreme Court.

This Court was satisfied that the two different statutory offenses were the "same" for the purposes of the Double Jeopardy Clause.

Although Brown dealt with "lesser included" and "greater offenses", the decision is a clear guide to the prohibition of a successive prosecution based upon repetition of proof. Ibid., 432 U.S. at p. 167 n. 6, 97 S.Ct. at p. 2226 n. 6. If the "Double Jeopardy Clause is not such a fragile guarantee



that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units" surely it can not be avoided by retrying a defendant after an acquittal via an alternative criminal statute. Ibid. 432 U.S. at 170, 97 S.Ct. at p. 2227.³

"The short answer to this question is that there is no exception permitting a retrial once the defendant has been acquitted ..."
Sanabria v. United States, 437 U.S. 73, 75, 98 S.Ct. 2170, 2184 (1978).

³ In Jones v. State, 303 Md. 323, 493 A.2d 1062 (1985) the Maryland Court of Appeals held that a trial for theft under Article 27 §342 precluded a second trial for the same property regardless of any alternative theory such as receiving stolen property as compared with theft of the property.

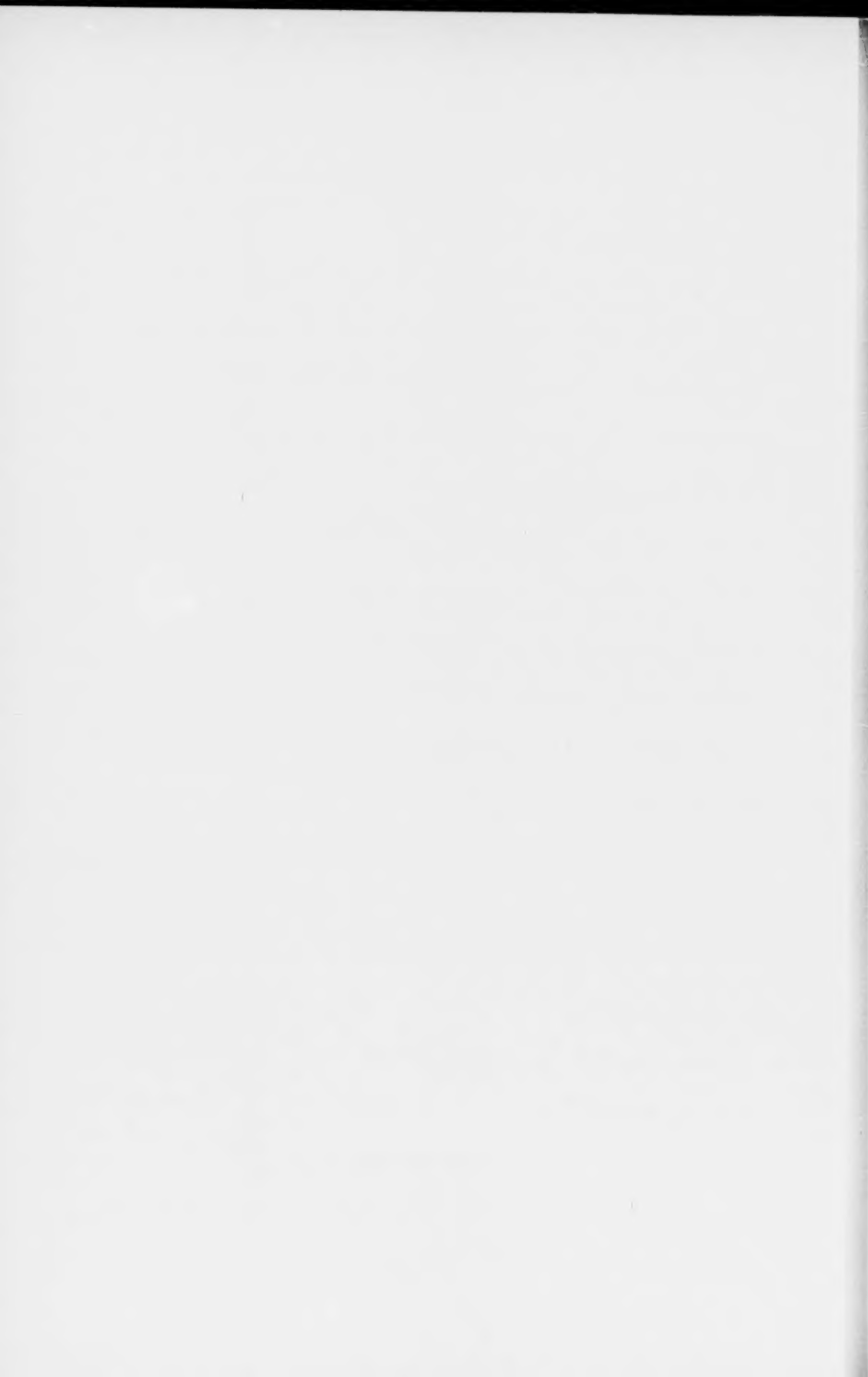


Sanabria is also very comparable to the instant situation. In Sanabria the defendant was charged with violating federal gambling laws involving both horses and numbers. The trial judge entered a judgment of acquittal on the entire count. The trial judge was in error as to an evidentiary ruling. Even so, that acquittal on the entire count precluded a second trial by the government based on the numbers activity.

The Petitioner seeks the protection of the Double Jeopardy Clause as established to prohibit his retrial based upon presentation of the exact "same evidence".

CONCLUSION

THEREFORE, for the foregoing reasons the Petitioner respectfully requests



that a Writ of Certiorari be issued to
the Court of Appeals of Maryland.

Respectfully Submitted,

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APPENDIX 1

**ARTICLE 27 §8
BURNING PERSONAL PROPERTY OF ANOTHER
ANNOTATED CODE OF MARYLAND
(1987 Repl. Vol.)**

(a) A person may not willfully and maliciously set fire to, burn or cause to be burned, or aid, counsel, or procure the burning of any personal property of another person.

(b) If the damage to the property is less than \$1,000, a person who violates the provisions of this section is guilty of a misdemeanor and may be fined up to \$500 or sentenced to a term of incarceration for not more than 18 months or both.

(c) If the damage to the property is \$1,000 or more, a person who violates the provisions of this section is guilty of a felony and may be sentenced to a

term of incarceration of not more than 5 years or fined up to \$5,000 or both. (An. Code, 1951, §8; 1939, §8; 1929, ch. 255, §8; 1969, ch. 514; 1977, ch. 229; 1981, ch. 768.)



APPENDIX 2

ARTICLE 27 §111
DESTROYING, INJURING, ETC.,
PROPERTY OF ANOTHER
ANNOTATED CODE OF MARYLAND
(1987 Repl. Vol.)

(a) Violation constitutes
misdemeanor. - Any person who shall
willfully and maliciously destroy,
injure, deface or molest any real or
personal property of another shall be
deemed guilty of a misdemeanor.

(b) Penalty where value of property
is less than \$300. - If the property
defaced, destroyed, injured, or molested
has a value of less than \$300, the
person who violates this section, on
conviction, is subject to a fine not
exceeding \$500 or imprisonment not
exceeding \$500 or imprisonment not
exceeding 60 days or both.



(c) Penalty where value of property is greater than \$300. - If the property defaced, destroyed, injured, or molested has a value of \$300 or more, the person who violates this section, on conviction, is subject to a fine not exceeding \$2,500 or imprisonment not exceeding 3 years or both. (An. Code, 1951, §119; 1939, §105; 1924, §94, 1912, §79; 1904, §71; 1888, §48; 1744, ch. 5; 1751, ch. 7; 1953, ch. 407; 1976, ch. 251; 1985, ch. 479.)

APPENDIX 3

**MONTGOMERY COUNTY CODE, SEC. 22-88(h)
OPEN FIRES GENERALLY**

No person shall kindle a fire upon
the land of another without permission
of the owner thereof or his agent.



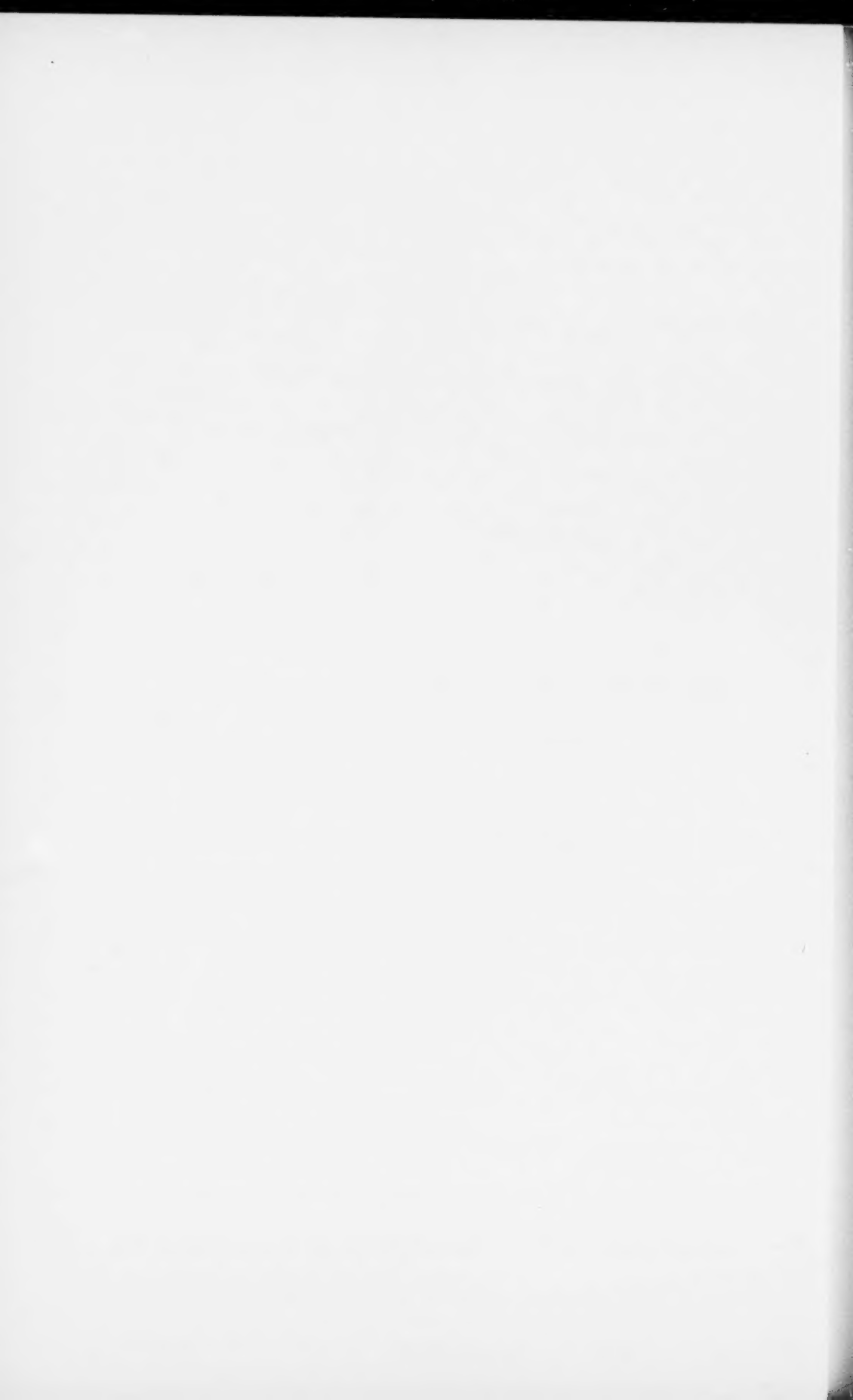
APPENDIX 4

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND :
vs. : MISC. PET.
NO. 7049
JOHN FRANCIS FINNEGAN :
Defendant :

MEMORANDUM OPINION AND ORDER

Defendant has filed an interlocutory appeal from the District Court's order (Klavan, J. presiding) denying Defendant's Motion to Dismiss. Defendant asserts that Criminal Information Number RD# R73616 charging Defendant with Malicious Destruction of Real Property and Kindling a Fire after he was acquitted in Criminal



Number 017837D1 of Burning Personal Property of Another violates the traditional Double Jeopardy prohibition of placing an individual twice in jeopardy for the same offense and is barred by collateral estoppel principles inherently embodied in the Double Jeopardy Clause. Additionally, the Defendant asserts that recharging him, albeit with two different offenses, was spurred by prosecutorial vindictiveness and thus violative of his Due Process rights.

FACTS:

On July 15, 1987, at approximately 5:01 a.m. a police officer was dispatched to investigate the burning of a swastika symbol on the front yard of the residence located at 809 Duke Street in Rockville, Maryland. The Defendant



was subsequently arrested and charged in Criminal Number 017837D1 with Burning Personal Property of Another, a violation of MD. ANN. CODE art. 27 §8 (1982 Repl. Vol.) Trial commenced August 25, 1987, at which time the state called four witnesses in its case-in-chief. At the conclusion of the State's case, the trial court (Klavan, J.) granted Defendant's Motion for Judgment of Acquittal.

The State then elected to charge the Defendant with Malicious Destruction of Real Property, a violation of MD. ANN. CODE art. 27§111 (1982 Repl. Vol. & 1987 Cum. Supp.) and with Kindling a Fire Upon Property of Another Without Permission, a violation of Montgomery County, Md., Code §22-88(h) (1984).

Prior to trial on these offenses, Defendant filed a Motion to Dismiss. Defendant challenged the information on Double Jeopardy and Due Process grounds. On October 20, 1987, the District Court (Klavan, J.) denied the motion on all grounds and the Defendant exercised his immediate right of appeal.

DOUBLE JEOPARDY:

The Double Jeopardy Clause of the Fifth Amendment incorporated to the states through the Fourteenth Amendment due process clause, see Benton v. Maryland, 395 U.S. 784 (1969), provides, inter alia, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb ..." U.S. Const. amend. V. Incorporated within the tenet are four distinct protections: 1) classic former jeopardy;



2) simultaneous jeopardy; 3) retrial following mistrial and 4) collateral estoppel. West v. State, 52

Md. App. 624,628 (1982).

The Defendant is asserting that two of these protections preclude the State from proceeding to a trial a second time. Specifically, the defendant is arguing that the subsequent prosecution for damage to the property located at 801 Duke Street is precluded by the successive prosecution protection and that the ultimate issue previously resolved in his favor (i.e. - acquittal as to burning the personal property of another) collaterally estops the State from litigating the new charges.

DOUBLE JEOPARDY FOR SUCCESSIVE PROSECUTIONS:

Because the Double Jeopardy Clause protects an individual from being placed



twice in jeopardy for the same offense, the protection is triggered only when the Defendant is being charged with the same offense. Maryland has consistently adopted the "required evidence test" as the primary determinant of whether different statutory offenses are deemed the same for double jeopardy purposes. Cousins v. State, 277 Md. 383, 388(1976). This test focuses upon the evidence minimally necessary to secure a conviction on each offense. Basically, if both offenses charged require proof of a fact which the other does not, then multiple prosecutions for offenses occurring from the same criminal act are not precluded by the Double Jeopardy Clause. However, "where one offense requires proof of an additional fact, so

that all elements of the one offense are present in the other, the offenses are deemed to be the same for double jeopardy purposes." Thomas v. State, 277 Md. 257,267 (1976).

In Thomas v. State, double jeopardy precluded a subsequent conviction for unauthorized use when the Defendant was previously convicted of driving a motor vehicle without the consent of owner and with intent to temporarily deprive the owner of possession. The Court stated that the same evidence to convict on driving a motor vehicle without the consent of the owner would always suffice to convict on unauthorized use. Although the offenses were not precisely the same, the Court found them to be the same for Double Jeopardy purposes. Id. at 270.



Unlike Thomas, when applying the required evidence test to this case, it is clear that the Defendant has not been twice in jeopardy for the same offense. At the August 25, 1987 trial, wherein the State called four witnesses, Defendant was placed in jeopardy for destruction of personal property of another. (In a non-jury trial jeopardy attaches when witnesses are sworn and testify, State v. Rhodes, 36 Md. App. 214 (1977).) This offense has as its requisite elements: 1) a willful and malicious intent 2) to burn, cause to be burned, aid, counsel, or procure the burning 3) of personal property 4) of another. Upon retrial, the Defendant will be placed in jeopardy for maliciously destroying real property of another (see, Information, Tab 1). This



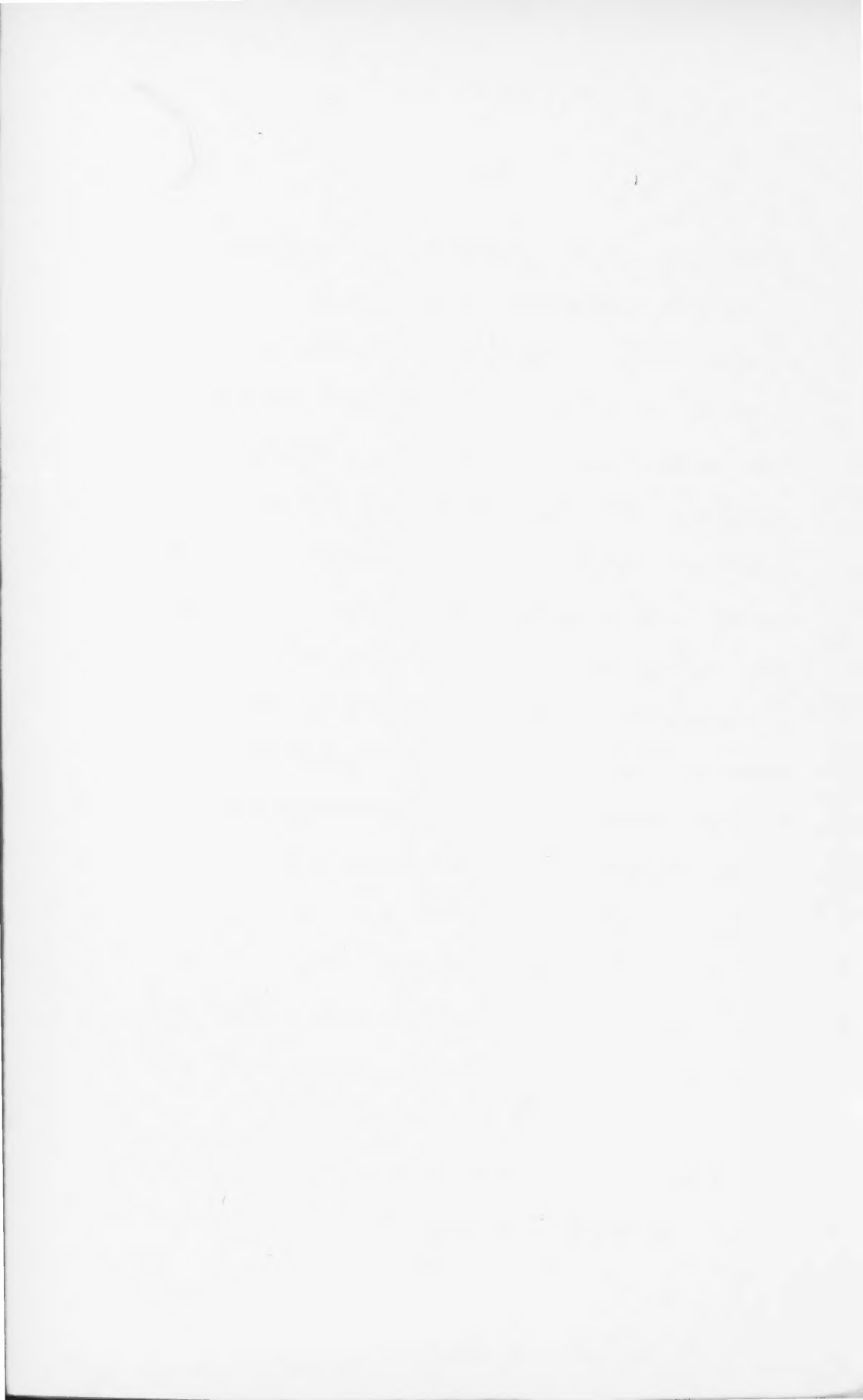
offense has as its requisite elements: 1) a willful and malicious intent 2) to destroy, injure, deface or molest 3) any real property 4) of another. Although two elements of each offense are identical; the mental state required and the ownership of property required, the other elements essential for a conviction are sufficiently distinct and do not trigger a double jeopardy violation. As charged, both offenses require proof of an element that the other offense does not (realty in the second case versus personalty in the first case).

The Defendant also takes issue to the State's constitutional ability to successively try the Defendant under different prosecutorial theories for the same act. Ultimately, the Defendant is



asserting that the State is required to join all offenses which arise out of a single act. To date, Maryland has not enacted a compulsory joinder provision requiring such action. Further in Cousins, 277 Md. at 395, the Court of Appeals noted that Maryland has not recognized a common law right to join at one trial all offenses arising from one transaction. (Defendant acquitted of assault upon one store detective not barred from prosecution for assault upon other store detective and not barred from prosecution for larceny, shoplifting or receiving stolen goods even though all offenses arose from one transaction, Cousins v. State, 277 Md. 383 (1976).)

Similarly, Maryland courts have never adopted the same transaction test



as a constitutional mandate. Simply stated, this test interprets offenses to be the same for double jeopardy purposes because they arise from the same act or transaction. Because Maryland does not have a Double Jeopardy Clause in its Constitution or Bill of Rights, see, Thomas v. State, 277 Md. at 467., Maryland must interpret the Fifth Amendment and other constitutional guarantees within the boundaries set by the Supreme Court. In Cousins v. State, 277 Md. at 394, the Court unequivocally indicated that the "same transaction test" is not of constitutional dimension in multiple trial situations. To date, this is the definitive word and will not now be disturbed.

DOUBLE JEOPARDY - COLLATERAL
ESTOPPEL

The second element of Double Jeopardy at issue is whether the State is collaterally estopped from proceeding to trial because of Defendant's acquittal at the first trial.

Initially, it should be noted that collateral estoppel is an available defense in criminal litigation. Ashe v. Swenson, 397 U.S. 436 (1970). Collateral estoppel "protects an individual against being placed in new peril on different charges after an ultimate and unquestioned fact finding on an earlier charge which would of necessity negate guilt at the subsequent trial of a factually related though legally distinct charge." Stevens v. State, 34 Md. App. 164,169 (1976).

In Ashe v. Swenson, 397 U.S. 436 1970 six poker players were robbed at gunpoint. The jury acquitted the Defendant at the first trial implicitly determining that Ashe had not been one of the perpetrators. The State was then collaterally estopped from further prosecution of Ashe; the determination of innocence in trial number one necessarily negated his guilt in trials number two through six. Similarly, in Powers v. State, 285 Md. 269 (1979), a jury acquitted Defendant of robbery of one individual and attempted robbery of another individual. A mistrial was declared as to the robbery of a third individual. The Court of Appeals barred a second prosecution for the case which resulted in a mistrial, finding that the offenses arose from one criminal



transaction and that Powers had not attempted or committed the robbery in either of the other two cases thus alleviating the necessity of litigating his identify again.

Defendant was previously found innocent of burning personal property of another. This issue cannot again be litigated. However, the two pending charges do not require Defendant to relitigate his culpability as to personal property. The finding of innocence as to that charge does not necessarily exonerate the defendant from guilt on these charges. Accordingly, the State is not collaterally estopped from bringing the present charges.

PROSECUTORIAL VINDICTIVENESS:

Defendant also asserts that his Due Process rights are being infringed upon



because the State's decision to proceed to trial was and is spurred by a vindictive motive. Defendant cites the disparate treatment accorded himself and the Co-Defendant as evidence of the alleged vengefulness. This argument was presented to the trial judge, via a pre-trial motion, and was denied.

Upon review of the court file, controlling cases, and proper credence being given to the trial judge's findings, it does not appear such disparity warrants a dismissal of this case. The Co-Defendant contacted the police, gave a statement regarding the incident and identified this Defendant. With this identification, the State then had probable cause to believe the Defendant committed the offense. The Defendant was subsequently arrested and

tried in the District Court. In contrast, the Co-Defendant was not brought to trial but required to perform eighty hours of community service.

As noted in Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978), once probable cause exists, the decision to prosecute and what charges to bring are generally within the discretion of the prosecutor. So long as the decision is not deliberately based upon race, religion or other arbitrary classifications; prosecutorial selectivity does not trigger a constitutional violation. Id. at 364. In Bordenkircher, the Court found no violation of Due Process when the State charged Defendant under a recidivist statute after the Defendant failed to negotiate a plea agreement. However, in

Blackledge v. Perry, 417 U.S. 211 (1974), the State's action of charging Defendant with felonious assault with intent to kill and inflict serious bodily injury, obtained during pendency of appeal from conviction of misdemeanor of assault with deadly weapon on same conduct, was held violative of his Due Process rights. In Blackledge, the prosecutor was seeking a felony conviction, due, in part, to Defendant exercising his statutory right of appeal. The prosecutor also had a potential motive to discourage this and other misdemeanants from appealing and receiving a trial de novo (i.e. - saving prosecutorial resources, state funds, possibility of defendant's being acquitted).

This recharge appears to be made to



cure a charging defect and does not appear to be based upon race, religion or any other arbitrary classification. Further, the State's decision to recharge the Defendant does not appear to be motivated to discourage the Defendant from exercising his constitutional right to counsel. Having once expended its resources to bring this case to trial, the State is now proceeding to obtain a conviction. The mere fact that two Co-Defendants are not accorded the exact same treatment does not trigger a due process violation. The State has articulated reasons why these Co-Defendants were treated differently and this Court is satisfied with the explanation.



ORDER OF COURT

For all the reasons set forth above,
it is this 9th day of February,
1988, by the Circuit Court for
Montgomery County, Maryland,

ORDERED, that Defendant's Motion to
Dismiss is hereby DENIED. Judgment of
District Court AFFIRMED.

JOHN J. MITCHELL

Judge, Circuit Court for
Montgomery County, MD



APPENDIX 5

**IN THE COURT OF APPEALS
OF MARYLAND**

Petition Docket No. 7
September Term, 1988

(Misc. No. 7049 - Circuit
Court for Montgomery County)

JOHN FRANCIS FINNEGAN, III

v.

STATE OF MARYLAND

ORDER

Upon consideration of the petition for a writ of certiorari to the Circuit Court for Montgomery County and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no



showing that review by certiorari is
desirable and in the public interest.

/s/ Robert C. Murphy

Date: May 31, 1988



CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition was sent by way of certified mail return receipt requested to the Office Of The Attorney General of Maryland, #1 N. Calvert Street, Baltimore, Maryland and hand delivered to Frank Mahoney, Esq., Assistant State's Attorney for Montgomery County, Maryland, c/o Montgomery County Court House, 50 Court House Square, Rockville, Maryland 20850.

William Francis Xavier Becker